Southern Finance Co Bhd v Zamrud Properties Sdn Bhd (No 3)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–67 OF 1997
KAMALANATHAN RATNAM J
19 NOVEMBER 1998

Civil Procedure *— Costs — Taxation — Getting-up — Review of decision of registrar — Registrar wrongly held that proceedings were auction proceedings — Registrar wrongly discounted actual value of properties involved — Registrar made wrong conclusion as to loss sufferred — Whether court entitled to interfere with award — Rules of the High Court 1980 O 59 r 36(1)*

Civil Procedure *— Costs — Taxation — Getting-up — Review of decision of registrar — Whether defendant entitled to all getting-up necessary for preparation of case and not just issues relied on by court in arriving at decision — Rules of the High Court 1980 O 59 r 36(1)*

On 5 January 1998, the court had dismissed with costs the plaintiff's application for an order for sale. In making his award for getting-up fees, the learned senior assistant registrar ('the SAR') was of the view that: (i) the proceedings before the court on 5 January 1998 was an auction proceeding; (ii) there were only two issues involved; (iii) there was no proof shown as to the actual value of the properties involved; and (iv) it was not fair to burden the plaintiff with high costs because the plaintiff had already suffered a loss of RM8.2m. An award of RM10,000 for getting-up which was subsequently increased to RM15,000 was made. The defendant applied for a review of the award.

Held, setting aside the order of the SAR and awarding RM30,000 as fees for getting-up:

(1) The SAR had wrongly held that the proceedings were auction proceedings — when it was actually an application for sale — and that it does not usually involve issues of law which are difficult or novel. Since the justification of his award is based on a wrong premise, this is a clear case for the court to intervene (see pp 170I–171B).

(2) The defendant is entitled to all the getting-up necessary for the preparation of the case and not just the issues relied on by the court in arriving at the decision (see p 171E).

(3) The learned SAR also failed to consider that the total sum claimed by the plaintiff was in the region of RM10m. It is wrong for the learned SAR to have discounted the amount of money involved from his consideration in evaluating the sum to be awarded for getting-up, solely because there was no proof of the value of the properties to be auctioned (see p 171F–H).

(4) There was no basis for the learned SAR's conclusion that a sum of RM8.2m had been released to the defendant when this issue

had not been decided by the court and is the subject of a full trial before another court. This alone ought to motivate this court to interfere (see pp 171I–172B).

[Bahasa Malaysia summary

Pada 5 Januari 1998, mahkamah telah menolak permohonan plaintif untuk satu perintah jualan dengan kos. Dalam membuat award untuk yuran persediaan perbicaraan, penolong kanan pendaftar ('PKP') berpandangan bahawa: (i) prosiding di hadapan mahkamah pada 5 Januari 1998 adalah prosiding lelong; (ii) hanya dua isu yang terlibat; (iii) tiada bukti ditunjukkan berkenaan nilai sebenar hartanah yang terlibat; dan (iv) adalah tidak adil untuk membebankan plaintif dengan kos yang tinggi kerana plaintif telah pun menanggung kerugian sebanyak RM8.2 juta. Suatu award sebanyak RM10,000 untuk penyediaan guaman yang kemudiannya ditambahkan kepada RM15,000 telah dibuat. Defendan memohon untuk kajian semula award tersebut.

Diputuskan, mengetepikan perintah PKP dan mengawardkan RM30,000 sebagai yuran untuk penyediaan perbicaraan:

(1) PKP telah dengan salahnya memutuskan bahawa prosiding tersebut adalah prosiding lelong — walhal ia sebenarnya merupakan permohonan untuk jualan — dan ia tidak biasanya melibatkan isu-isu undang-undang yang rumit atau baru. Oleh kerana justifikasi award beliau adalah berdasarkan premis yang salah, ini merupakan kes yang jelas di mana mahkamah harus bercampur tangan (lihat ms 170I–171B).

(2) Defendan berhak kepada segala penyediaan guaman yang perlu untuk persediaan kes dan bukan sekadar isu-isu yang digunakan oleh mahkamah dalam mencapai keputusannya (lihat ms 171E).

(3) PKP juga telah gagal menimbang bahawa jumlah keseluruhan yang dituntut oleh plaintif adalah hampir RM10 juta. Adalah salah untuk PKP menolak jumlah wang yang terlibat daripada penimbangannya dalam menilai jumlah yang harus diawardkan untuk penyediaan guaman, semata-mata kerana tiada bukti berkaitan nilai hartanah yang akan dilelongkan (lihat ms 171F–H).

(4) Tiada dasar untuk kesimpulan PKP bahawa jumlah sebanyak RM8.2 juta telah dilepaskan kepada defendan walhal isu ini belum diputuskan oleh mahkamah dan menjadi subjek perbicaraan penuh di hadpaan mahkamah lain. Ini sahaja seharusnya mendorong mahkamah untuk bercampur tangan (lihat ms 171I–172B).]

Notes

For cases on taxation of getting-up fee, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras1415–1423.

Case referred to

Lloyds Bank plc v Ang Cheng Ho Quarry & Ors [1993] 1 MLJ 127 (refd)

Legislation referred to

Rules of the High Court 1980 O 59 r 36(1)
National Land Code 1965 ss 241(1), 256, 257

Shamira bte Karim Ally (*Soo Thien Ming & Nashrah*) for the plaintiff.
Shanti Thiruchelvasegaram (*Mahadevi Nadchatiram & Partners*) for the defendant.

Kamalanathan Ratnam J:

The application

This is an application by the defendant under O 59 r 36(1) of the Rules of the High Court 1980 to review the decision of the learned senior assistant registrar ('the SAR') against his own review made on 6 April 1998, when from his earlier award of RM10,000 for getting-up, the learned SAR increased the amount to RM15,000.

On 5 January 1998, I dismissed with costs the plaintiff's application for an order for sale, pursuant to ss 256 and 257 of the National Land Code 1965 ('the NLC'), of 34 units of property which the defendant charged to the plaintiff as security for a loan granted by the plaintiff to the defendant.

This taxation arose out of that order.

Court's findings

Dissatisfied with the increased award of RM15,000, the defendant has applied to me for a review of the learned SAR's award. My views on costs have been expressed in my article on 'Taxation of Costs' published in [1998] 1 MLJ xli. I said therein that:

> ... Save in an exceptional case or where some question of principle is involved, the judge will not interfere with the decision of the registrar on a question relating to fact or to the amount of costs and it is for the registrar to inquire whether the work was required to be done and he may disallow the whole costs of improper proceedings, but where he had not had reasonably sufficient material before him, or has taken into account matters which he should not have considered, or has not taken into account matters that he should have considered, or perhaps has given reasons that are incorrect, or where the matter is not purely one for his discretion, or where he has acted upon a wrong principle or adopted the wrong approach, the judge would order a review.

Applying this basic rule of thumb, I find that in this case, I need to interfere with the award of the learned SAR.

Wrong nomenclature used

The learned SAR was of the view that the proceedings brought before me on 5 January 1998 was in fact auction proceedings. Having wrongly held

A that the proceedings were auction proceedings, he therefore also wrongly concluded that auction proceedings are usually made in court and do not involve issues of law which are 'difficult or noble'; he probably must have meant 'difficult or novel'. Since the justification of his award is based on a wrong premise, this is a clear case for this court to intervene. What was before me was an application for sale. Only after the judge makes the order B for sale is there an auction which is normally conducted by the bailiff.

Not true that only two issues involved

The learned SAR found that there were only two issues decided by me. Whilst it is true that my written judgment is based only on two issues, I did C say in the final paragraph of my judgment that:

> In the circumstances, I find it unnecessary to consider the other issues raised by the defendant. The plaintiff's application is hereby dismissed with costs.

It is wrong for the learned SAR to have only considered the two issues identified by me in the judgment. He erred in failing to take account of the D fact that the defendant had researched and submitted on all the other issues for which the defendant is entitled to getting-up fees. As was said by his Lordship Chong Siew Fai J (as he then was) in *Lloyds Bank plc v Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127, an advocate and solicitor should not be precluded from preparing his client's case in greater depth to enhance chances of success.

E In the circumstances, the defendant is entitled to all the getting-up necessary for the preparation of the case and not just the issues relied on by the court in arriving at the decision.

Needless to say, there were at least six-seven other issues raised by the defendant which I felt unnecessary to decide upon. There is no need for me F to recount and narrate these other issues for the purposes of this review.

The amount in question

The learned SAR also failed to consider that the total sum claimed by the plaintiff was in the region of RM10m. Whilst the number of properties involved were 34 in number, the learned SAR reasoned that there was no G proof shown as to the actual value of the properties involved. Clearly, the amount at stake is around RM10m. Whilst there is no evidence as to the actual value of each property, the call for auction of these properties would no doubt raise a substantial sum. It is wrong in principle therefore for the learned SAR to have discounted the amount of money involved from his H consideration in evaluating the sum to be awarded for getting-up, solely because there was no proof of the value of the properties to be auctioned.

That a sum of RM8.2m was loaned

The learned SAR's statement that a sum of RM8.2m has been loaned to the defendant is wrong. There has been no such finding of fact by me in my I written judgment. I did not at all go into the merits of the case. I dismissed the plaintiff's application due to non-compliance with s 241(1) of the NLC. In fact, the defendant has denied categorically that a sum of RM4.9m has

been released to the defendant. I do not know on what basis the learned SAR's written grounds state that a sum of RM8.2m had been released to the defendant when this issue had not been decided by me and which issue in fact is the subject of a full trial before another court by way of Kuala Lumpur High Court Civil Suit No D6–22–31–97. A

The learned SAR's conclusion that it is not fair to burden the plaintiff with high costs because the plaintiff has suffered a loss of RM8.2m is totally unacceptable and based on his own assumption. This alone ought to motivate this court to interfere. B

Quantum

The defendant prays for a sum of RM100,000. To my mind, a fair award in this case, taking into consideration the amount of work put in and the research required, would be RM30,000. Whilst each party has cited various cases where various awards have been made, I must emphasise that each case must be considered on its own factual matrix peculiar to itself when considering an award for getting-up. C

As I said earlier, whilst it would be inappropriate for a judge to interfere with the exercise of discretion of the learned SAR in awarding costs, where such discretion is exercised based on wrong principles or facts, it is the bounden duty of a judge to interfere when called upon to do so. I therefore set aside the order of the learned SAR dated 6 April 1998 and instead award RM30,000 as fees for getting-up with costs of this application to the defendant. D E

Order set aside.

Reported by Loo Lai Mee

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